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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KONTAR SINGLETON, Defendant and Appellant.	B203646 (Los Angeles County Super. Ct. No. BA314827)

APPEAL from a judgment of the Superior Court of Los Angeles County. Marcelita Haynes, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kristofer Jorstad and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant of one count of possession for sale of cocaine base in violation of Health and Safety Code section 11351.5. The trial court suspended imposition of sentence and placed appellant on probation under terms and conditions that included serving 365 days in county jail.

Appellant appeals on the ground that the trial court's failure to instruct on the lesser included offense of simple possession of cocaine base was prejudicial error.

FACTS

Prosecution Evidence

On December 8, 2006, at approximately 5:45 p.m., Officer Paul Sandate and Detective Walthers from the narcotics unit of the Los Angeles Police Department were observing an apartment building on West 67th Street where they intended to serve a search warrant. In the span of 15 minutes, the two officers saw two persons separately enter and exit the driveway at the address. Each stayed no longer than one minute. After the 15-minute observation, the entry team executed the search warrant. Officer Sandate and Detective Walthers joined the entry team.

Officer Joseph Meyer was assisting in serving the warrant and was assigned to watch the west side of the apartment building. Officer Meyer saw appellant emerge from the back of the building and throw an object over a wall into the adjacent property. When appellant made eye contact with Officer Meyer, he ducked around the corner. Officer Meyer then heard other officers giving appellant orders as they took him into custody.

No one replied to the entry team's knocking, and the entry team attempted unsuccessfully to force open the front door. Eventually Kamilah Singleton (Kamilah), appellant's sister, opened the door from inside. The officers entered the apartment and detained Kamilah and her eight-year-old son, who were the only persons present in the apartment.

Officer Meyer told Officer Sandate that he had seen appellant throw something over the wall. Officer Sandate went to the neighbor's backyard and retrieved the only object he saw in the yard, which consisted of two plastic bags knotted together. The bags contained 42 small pieces of cocaine base.

Inside the apartment, officers found on top of a living-room cabinet a digital gram scale bearing off-white residue. Next to the scale was a razor blade bearing off-white residue. A video monitor inside the same cabinet was connected to a camera near the front window, and the monitor displayed views of the driveway and sidewalk. The officers found plastic baggies on the kitchen counter. On a block wall near the spot where appellant was detained, the officers recovered a razor blade bearing off-white residue.

When appellant was searched, police found a key to the back door of the apartment and $172 in United States currency in his possession. Kamilah told police that appellant had access to the apartment.

Officer James Mylonakis testified as an expert and stated that, in his opinion, the drugs in appellant's possession were intended for sale based on the totality of multiple factors.

Defense Evidence

Evadney Dawson (Dawson), appellant's aunt, lived in an apartment that was located in the same complex as Kamilah's. She testified that appellant arrived at her apartment between 5:00 and 5:30 p.m. with a friend on the day of the search. Dawson watched television while appellant and his friend used her computer. Because appellant was annoying her as she tried to watch television, Dawson told him to leave and to come back when she was not watching television. At Dawson's request, appellant took the trash out to the back when he left her apartment. Soon after appellant left, Dawson heard loud banging. On looking out her window, she saw police knocking on the door of Kamilah's apartment.

Akida Garrison (Garrison) was called to impeach Officer Meyer, and he testified about his arrest by Officer Meyer in February 2006. According to Garrison, Officer Meyer falsified the police report by stating that there was a gun hanging out of Garrison's pocket. Garrison testified that, although he had a gun in his back pocket, Officer Meyer could not have seen it when facing him, and also because Garrison wore a coat. Garrison

stated he was stopped and searched for no reason, and he filed a complaint against Officer Meyer shortly after the search.

DISCUSSION

I. Appellant's Argument

Appellant contends that the evidence that he possessed the cocaine base for sale was entirely circumstantial, and the expert's opinion that he intended to sell the contraband he possessed was based on unproved assumptions. Therefore, even though appellant did not request an instruction on the lesser included offense of simple drug possession, the court had a duty to read the instruction to the jury.

II. Relevant Authority

It is well-established that a trial court must instruct the jury not only on the crime charged but also on lesser offenses that are both included within the crime charged and supported by the evidence. (*People v. Barton* (1995) 12 Cal.4th 186, 190, 194-195.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Pure speculation does not constitute the requisite substantial evidence sufficient to support a lesser included offense instruction. (*People v. Wilson* (1992) 3 Cal.4th 926, 942; *People v. Lewis* (1990) 50 Cal.3d 262, 277.) If there is no proof that the offense was less than that charged, an instruction on a lesser included offense need not be given. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323-324, disapproved on another point in *People v. Barton*, *supra*, 12 Cal.4th at p. 201.)

If the trial court fails in its duty to instruct on a lesser included offense supported by the evidence, the error is one of state law alone. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.) It does not require reversal unless "an examination of the entire record

establishes a reasonable probability that the error affected the outcome." (*Id*. at pp. 165, 178; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

III. Trial Court Did Not Err

An instruction on the lesser offense of simple possession was required in this case only if there was substantial evidence that appellant was guilty of possessing the cocaine without having the intent to sell it. We find that there was no evidence "'sufficient to "deserve consideration by the jury"'" (*People v. Lewis* (2001) 25 Cal.4th 610, 645) that appellant possessed the cocaine found in the adjacent lot but not with the intent to sell it.

According to the evidence, appellant possessed at least 8.12 grams of cocaine base in the 42 pieces he tossed over the wall. On his person he carried $172 in bills of $20, $10, $5, and $1. He had a key to his sister's apartment where police found a digital scale and a razor blade bearing residue as well as plastic baggies. Inside the cabinet where these items were found, a video monitor kept watch over the entrance to the apartment. Police had observed two persons separately entering and exiting the apartment after staying for very short periods of time. A razor blade and residue were found in the rear of the apartment building where appellant was detained.

Detective Mylonakis testified that he was of the opinion that the cocaine appellant threw over the wall was possessed for sale first because of the investigation he had conducted that led to the warrant. In addition, the amount of cocaine base appellant possessed was "well beyond what somebody would use for personal use." In his 12 years of experience as a police officer, having been involved in over 200 narcotics investigations resulting in over 200 arrests, he had never encountered a user having as many rocks of cocaine as appellant had. The street price of the 42 rock pieces found by police was about $10 each, and criminals who possess cocaine base for only personal use are usually found to possess only one or two small pieces.

Detective Mylonakis also testified that the packaging was indicative of sales. He stated that most of the pieces were wrapped in clear plastic so that they could be sold individually. Commonly, when a piece was sold, the buyer placed it in his or her mouth so that the piece could be swallowed if the person were stopped by police. Appellant did

not have burnt lips or fingers, which are commonly seen on mere users. Appellant also did not possess any smoking paraphernalia. The razor blades, one of which was found near the scale, are used to make a big piece into smaller pieces for sale, which are then weighed on the digital scale. Despite defense counsel's attempts to elicit that appellant could have been a bulk buyer in order to get a cheaper price, Detective Mylonakis maintained that from his experience, when cocaine was sold in bulk, it was generally sold in one large chunk. According to Detective Mylonakis, the totality of the factors he discussed during direct and cross-examination led to the conclusion that the cocaine was possessed for sale and that it was "pretty obviously a sales case."

All of these factors clearly lead to the conclusion that appellant was in possession of the large amount of cocaine base for the purpose of selling it. There is no factor that points to possession for mere personal use and appellant names none, stating only that "substantial evidence supports a finding of the lesser included offense of simple possession." He offers only speculative theories of guilt in support, stating that the jury could have reasonably concluded that appellant cut the cocaine into pieces for his own use or that he bought it from someone else in this form. He also asserts that the jury did not have to accept Detective Mylonakis's statements regarding the characteristics of typical cocaine users—characteristics that appellant lacked. He posits that appellant may have only had temporary possession of the drug for the purpose of disposing of it for the owner, who may have been his sister. None of these theories constitute substantial evidence of mere personal use.

People v. Saldana (1984) 157 Cal.App.3d 443 (*Saldana*), relied upon by appellant, is distinguishable. In the first instance, there was no direct evidence of appellant's possession. Officer Meyer saw him throw an object that subsequent investigation proved to be tied-together plastic bags containing rocks of cocaine. Moreover, the evidence presented at trial in *Saldana* precludes that case from being analogous to the instant case, despite the fact that the general principles set out in *Saldana* may be applicable in cases where a failure to instruct on a lesser included offense is alleged.

In *Saldana*, an officer testified that the defendant was found lying on a bed, and the officer saw defendant quickly put his hand into a headboard where 18 balloons of heroin were later found. (*Saldana*, *supra*, 157 Cal.App.3d at p. 450.) It was later determined that the defendant shared the room with his mother, and that the headboard where the heroin was found was his mother's. (*Ibid*.) The defendant's brother, a known user and seller of heroin, was found in the basement of the same home, and was determined to have 135 puncture wounds on his arms and to be under the influence of heroin. (*Id*. at p. 451.)

The defendant in *Saldana* testified that the officer first saw him while the defendant stood outside his bedroom door. (*Saldana*, *supra*, 157 Cal.App.3d at p. 452.) Defendant's sister and brother-in-law also placed defendant outside the bedroom when the officers entered. (*Ibid*.) Defendant also denied telling the officer that he sold only a "little weed." (*Ibid*.) The defendant was charged with possession of heroin for sale and marijuana for sale, and the trial court did not instruct on the lesser included offense of simple possession of heroin. (*Id*. at p. 449.)

The *Saldana* court stated that the issue at trial was whether the defendant intended to sell the heroin, and the prosecution's evidence was purely circumstantial on that point, consisting of an expert's opinion based on various factors (as in the instant case). (*Saldana*, *supra*, 157 Cal.App.3d at p. 457.) Therefore, the test of whether the jury should have been instructed on the lesser included offense of simple possession was whether there was any evidence deserving of consideration by the jury. (*Ibid*.) In other words, it was necessary to determine whether there was "'evidence from which a jury composed of reasonable men could have concluded that'" the defendant possessed the heroin but did not have the intent to sell it. (*Ibid*.) The court decided that, because there was direct evidence to prove constructive possession (since the defendant exercised joint dominion and control over the bedroom in which the heroin was found), and only conflicting circumstantial evidence of possession for sale, the defendant was entitled to the lesser included instruction. (*Id*. at pp. 455, 457.) The *Saldana* court stated that it

could not say, as a matter of law, that the defendant's version of events would not be accepted by a jury.

In the instant case, however, there was no evidence of mere possession of the cocaine that was deserving of consideration by a jury. If appellant surreptitiously attempted to dispose of the quantity of cocaine that was found, there were no conflicting facts from which the jury could infer he possessed the cocaine without the intent to sell. The prosecution's evidence was uncontradicted, whereas in *Saldana* there was conflicting testimony offered by the defendant, his sister, and her husband, who were all at the residence during the search. The *Saldana* court determined that the jury "could have decided the intent to sell issue either way because of the conflicting testimony." (*Saldana, supra,* 157 Cal.App.3d at p. 458.) For example, the jury could have decided that the defendant tried to hide the balloons for his brother, the heroin user and seller who was found in the basement of the home. (*Id*. at p. 457.) And since some of the balloons were cut open, there was an inference that the balloons were for personal use despite being packaged as if for sale, and the defendant possessed them for his brother's use. (*Ibid*.) The court stated that any of these inferences would have been reasonable based on the evidence. In the instant case, however, although defense counsel attempted to implicate Kamilah and perhaps others, there was no evidence she or anyone in her life was a drug user or drug seller. Finally, the *Saldana* court found it harmful error that the trial court gave a simple possession instruction on the possession for sale of marijuana count with which the defendant was charged. (*Id*. at p. 458.) In the instant case, there was no such potential for jury confusion. Therefore, despite *Saldana's* broad principle, the facts of the instant case do not compel a jury instruction on simple possession as a lesser included offense.

Even assuming error in this case, we conclude that the failure to instruct on the lesser included offense of simple possession was harmless in any event. As stated previously, in a non-capital case, an error in failing to instruct on a lesser included offense requires reversal only if the error is prejudicial under the standard of *Watson*; that is, only if it is reasonably probable that defendant would have obtained a more favorable

result if the error had not occurred. (*Breverman, supra,* 19 Cal.4th at p. 178.) "Appellate review under *Watson* . . . focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. Accordingly, a determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial. Application of the *Watson* standard of appellate review may disclose that, though error occurred, it was harmless." (*Id*. at pp. 177-178, fn. omitted.) Put simply, to find the error prejudicial, the entire record must show that, if given the choice between the lesser and the greater offenses, it is reasonably probable the jury would have convicted of the lesser. (*Id*. at p. 178, fn. 25.)

In this case, the question is whether it is reasonably probable that the jury would have found appellant possessed the cocaine found in the discarded baggies only for his own personal use. Given the facts of the case, discussed *ante*, such an outcome was not reasonably probable. Although the jury asked for readback of the testimony of Detective Walthers, Officer Sandate, and Officer Meyer, they did not ask for readback of the expert witness who testified that the drugs were for sale, Detective Mylonakis. There was no evidence that would have justified a conclusion by the jury that, if appellant possessed the cocaine, he did not possess it for the purpose of sale, but rather for personal use. (See *People v. Douglas* (1987) 193 Cal.App.3d 1691,1695-1696 [no need to instruct on lesser included offense of simple possession of marijuana where defendant had 14 individual baggies in area known for drug trafficking].)

Appellant's arguments are without merit.

DISPOSITION

The judgment is affirmed.

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_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST